No. 14635

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NICK JOHN KALINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on November 3, 1954, under Section 462 of Title 50 App., United States Code, for refusing to submit to induction into the Armed Forces of the United States [Tr. 3 and 4].

On November 15, 1954, appellant appeared before the Honorable James M. Carter, United States District Judge. He was arraigned and entered a plea of not guilty. The case was set for trial for November 23, 1954 [Tr. 4 and 5].

On November 23, 1954, trial was begun in the United States District Court for the Southern District of California, before the Honorable James M. Carter, without

a jury and at the close of evidence and argument the case was taken under submission by Judge Carter [Tr. 15-42].

On December 13, 1954, appellant was found guilty as charged in the indictment [Tr. 50].

On December 20, 1954, appellant was sentenced to imprisonment for four years [Tr. 55].

The District Court had jurisdiction of the cause of action under Section 462 of Title 50 App., United States Code, and Section 3231 of Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.
STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50 App., United States Code.

The Indictment charges a violation of Section 462 of Title 50 App., United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty af carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.
STATEMENT OF THE CASE.

The Indictment returned on November 3, 1954, charges that the appellant was duly registered with Local Board No. 110. He was thereafter classified I-A-O and notified to report for induction into the Armed Forces of the United States on May 26, 1954, in Los Angeles, California. The Indictment charges that the defendant at that time and place did knowingly fail and refuse to be inducted into the Armed Forces of the United States [Tr. 3 and 4].

On November 15, 1954, appellant appeared for arraignment and plea before the Honorable James M. Carter, United States District Judge. Appellant was there represented by his attorney, J. B. Tietz, Esq. Appellant entered a plea of not guilty and his case was set for trial on November 23, 1954 [Tr. 4 and 5]. On November 23, 1954, trial was held before the Honorable James M. Carter, without a jury and the case taken under submission by him [Tr. 15-42].

On December 13, 1954, appellant was found guilty as charged in the Indictment [Tr. 50].

On December 20, 1954, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of four years [Tr. 55].

Appellant assigns as error the judgment of conviction on the following grounds:

1. The District Court erred in failing to grant the motions for judgment of acquittal.

2. The District Court erred in convicting the appellant and entering a judgment of guilty against him (Appellant's Br. p. 6).

IV.
STATEMENT OF THE FACTS.

On September 8, 1948, Nick John Kaline registered under the Selective Service System with Local Board No. 110, Los Angeles, California [Ex. 2, p. 1].* He gave his date of birth as August 31, 1926, and was at that time 22 years old. On his registration card in Question No. 10 he was asked "Were you ever rejected for service in the Armed Forces?" He checked the answer "Yes" and wrote in "1945."

In November, 1948, appellant completed his Classification Questionnaire. At that time he did not sign Series XIV [Ex. 2, p. 10] or in any way indicate that he was a conscientious objector. Meanwhile the Local Board was advised that appellant had been rejected for service at the induction station in 1945 because of "valvular heart disease" [Ex. 2, p. 13]. On February 17, 1949, appellant was classified IV-F by the Local Board by a vote of 2 to 0.

On August 15, 1951, the Local Board was advised by Pacific Bible College that appellant was no longer enrolled as a student in that school [Ex. 2, p. 16]. Actually appellant has ceased to attend Pacific Bible College in January, 1951 [Ex. 2, p. 52], but he at no time advised the Local Board of this change in his status. At the time appellant ceased attending the seminary—and lost any claim he might have had to a IV-D classification—he was 24 years old.

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*Exhibit 2 refers to appellant's Selective Service File and the page numbers refer to the circled numbers in the file. Exhibit 1 consists of the correspondence of Homer D. Crotty, the Hearing Officer of the Department of Justice, concerning appellant's case.

On December 18, 1951, appellant was classified I-A by the Local Board by a vote of 3 to 0 [Ex. 2, p. 11].

On December 27, 1951, appellant was mailed an "Order to Report for Armed Forces Physical Examination" [Ex. 2, p. 17]. Two days later on December 29th the Local Board received a letter from appellant asserting that he had always been a conscientious objector and requesting an appropriate form [Ex. 2, p. 18]. The form was then mailed to appellant and returned by him on January 18, 1952 [Ex. 2, pp. 19-22]. On March 1, 1952, the Local Board classified appellant I-O by a vote of 2 to 0.

On October 20, 1952, after having again been found physically acceptable for service, appellant was mailed an "Application of Volunteer for Civilian Work" with an accompanying letter from the Local Board, in accordance with the civilian work program for conscientious objectors [Ex. 2, pp. 24 and 26]. No reply was received from appellant. On November 20, 1952, appellant was classified I-A by a vote of 3 to 0.

On November 28, 1952, appellant wrote a letter to the Local Board [Ex. 2, p. 25] expressing his dissatisfaction with his classification. Thereafter the Local Board permitted the defendant to appear before them in person on December 19, 1952. The summary of this meeting may be found at pages 27 to 30 of appellant's Selective Service file [Ex. 2]. At that appearance appellant explained his views and also revealed to the Local Board that he was employed at Com-Air Products, a machine shop doing defense work [Ex. 2, p. 30]. Following the personal appearance appellant was classified I-A-O on December 19, 1952, as a person opposed to combatant service and train-

ing but not opposed to non-combatant service [Ex. 2, p. 11].

It is interesting to note at this point that while appellant did not advise the board that he had ceased to attend school, and did not advise the board until the time of the interview that he was employed in a defense plant, and as will be seen later, he did not advise the board of his change of address—nevertheless he notified the board on December 23, 1952 [Ex. 2, p. 31] that there had been a "change in age" wherein appellant became 26 years old.

On December 31, 1952, appellant wrote the board another letter [Ex. 2, pp. 33-34]. In that letter appellant stated:

> "I even changed my place of employment, after great consideration of doing the right thing. I am not a pacifist and felt this is where the line must be drawn; I could do an important job and still not be bound to an 'oath of man,' but rather to the 'oath of God.'" [Later investigation reveals Ex. 2, pp. 52-53, that appellant left Com-Air Products in February, 1953, and became employed by the A. O. Smith Corporation, another plant doing war work.]

The Local Board treated this letter from appellant as a letter of appeal and forwarded his file to the Appeal Board on February 19, 1952 [Ex. 2, p. 36].

On September 18, 1953, the Appeal Board asked for and received on September 23rd appellant's latest address [Ex. 2, p. 39]. This information was transmitted by the Appeal Board to the Department of Justice where the case had been referred for investigation and hearing [Ex. 2, p. 40]. On January 21, 1954, appellant was notified that his hearing before a Hearing Officer of the Department of Justice had been set for February 4, 1954 [Ex. 1]. Ap-

pellant failed to appear at the hearing and on February 5, 1954, the Hearing Officer returned his file to the Department of Justice [Ex. 1]. At this point the Department of Justice still held itself ready to give appellant a hearing and on February 10, 1954, wrote the Local Board for appellant's latest address [Ex. 2, p. 41]. On February 12th, the Local Board replied to the inquiry from the Department of Justice, advising that appellant's latest address was the one earlier given them [Ex. 2, p. 42]. On February 16th, appellant advised the Local Board of his change of address [Ex. 2, p. 43], and on March 1, 1954, he wrote the Hearing Officer requesting a new hearing date [Ex. 1]. On March 2nd the Hearing Officer replied to appellant's letter and on the same day wrote the Department of Justice concerning appellant's request. By letter dated March 12, 1954, the Department of Justice advised the Hearing Officer that appellant's case had already been processed by the Department [Ex. 1]. On March 15, 1954, the Department of Justice wrote the Appeal Board [Ex. 2, pp. 47-50] recommending that appellant be classified in I-A-O because "his employment by a concern which is working on contracts for the various branches of the Armed Forces is apparently inconsistent with a professed conscientious objection to service in the armed forces in a non-combatant capacity." Thereafter on April 15, 1954, appellant was classified I-A-O by the Appeal Board by a vote of 3 to 0 [Ex. 2, p. 11].

On May 12, 1954, appellant was mailed an Order to Report for Induction ordering him to report on May 26, 1954 [Ex. 2, p. 54].

On May 26, 1954, appellant reported to the induction station but refused to be inducted into the Armed Forces [Ex. 2, pp. 55-57].

V.

ARGUMENT.

POINT ONE.

The Fact That the Local Board Did Not Have a Person With the Title of "Advisor" Did Not Deny Defendant Due Process of Law.

Appellant relies on Section 1604.41 of the Selective Service Regulations (32 C. F. R. 1604.41). That section provides for the appointment of "Advisors to Registrants" and describes their duties as "to advise and assist registrants in the preparation of questionnaires and other Selective Service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law." The testimony concerning advisors reveals [Tr. p. 31] that there was no one with the "technical name" of advisors but that there are other people in the Selective Service System who perform the same functions. The record also reveals [p. 37] that appellant testified that he never at any time made a request of the Local Board for assistance or advice, rather he consulted his minister. It should be noted that all the evidence concerning advisors came from officials of Selective Service and the appellant was not asked whether he had ever examined the bulletin board of his Local Board. Appellant's Selective Service file [p. 11] reveals that he was in the Local Board office on only one occasion. The record of appellant's personal appearance before the Local Board on December 19, 1952, reveals that during most of this period appellant was a college student.

It would seem clear on this record that appellant was not denied due process of law by the failure to have someone with the title of "advisor." This is at most a mere irregularity and not a matter of due process.

Appellant in his brief at page 11 cites the case of *Simmons v. United States,* 348 U. S. 397, decided March 14, 1955, in support of his contention. That case involved the failure of a Hearing Officer to advise a registrant of adverse evidence. The Supreme Court remarked [pp. 405-406]:

> "We are endeavoring to apply a procedure . . . in accordance with the statutory plan and the concepts of basic fairness which underlie all our legislation . . . This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamenal safeguard, . . ."

Appellee submits that the faiure to have someone by the title of advisor does not infringe our "concepts of basic fairness" but rather is at most "an incidental infringement of technical rights."

Appellant further urges the Court at page 10 of his Brief to consider the fact that on January 31, 1955, the Regulations were amended to make the appointment of advisors permissive. Appellant refers to this as an "implied admission." This is very much like offering evidence of safety precautions taken after an accident in order to prove negligence—a practice frowned on by all Courts. The Amendment of this Regulation admits nothing. It is designed merely to eliminate the argument and re-argument in case after case of a matter that does not affect the rights of a Selective Service registrant. Surely it would not be argued that a registrant was denied due process of law if there was no provision in the regulations for an "advisor." How then can the failure to have someone with that title constitute a denial of

due process? Either the Director of Selective Service has created a new constitutional right, or it is only an irregularity. If an irregularity, then there must be some evidence of prejudice to the registrant. There is no such evidence in the instant case.

POINT TWO.

The Evidence Shows That Appellant Was Given an Opportunity to Go Through the Induction Ceremony and Refused to Do So.

In *Chernekoff v. United States,* 219 F. 2d 721, this Court ruled that a registrant must be given a definite opportunity to be inducted or refuse to be inducted into the Armed Services. In that case, at page 725, the Court states the following as facts:

> "In the present case the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the Appellant as he had said he would not if asked to so do step forward and become inducted into the Armed Forces."

This is not the evidence in the instant case. Appellant's Selective Service file reveals that on May 26, 1954, induction officials notified the United States Attorney of appellant's refusal to be inducted into the Armed Services [Ex. 1, p. 55]. At page 56 of the Exhibit there is a statement signed by appellant and dated May 26, 1954, stating his refusal to be inducted. This statement was witnessed by a Captain Beydler, the same officer who sent the notice to the United States Attorney. Nowhere is there any evidence that "appellant was not given the

prescribed opportunity to step forward, nor the prescribed warning" which were the facts in the *Chernekoff* case. Quite to the contrary, it is presumed that the regulations were followed.

> "A presumption of regularity attaches to official proceedings and acts; it is a well settled rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and *where the contrary is asserted it must be affirmatively shown.*" (*Koch v. United States,* 150 F. 2d 762, 763, which is a Selective Service case from the Fourth Circuit.) (Emphasis added.)

Thus the presumption exists in this case that appellant was ordered to take the one step forward. It is a presumption that can only be overcome by affirmative evidence to the contrary. The record in this case reveals that appellant took the witness stand on his own behalf at the trial below. He was there represented by his attorney, J. B. Tietz, Esq. Nowhere in appellant's testimony [Tr. pp. 32-37] is there any indication he was not ordered to take the one step forward.

The evidence in appellant's Selective Service file supports the conclusion that he was in fact asked to take the one step forward. The induction procedures are found in Special Regulation 16-180-1. As a part of that same regulation, induction officials are required in paragraph 27(b)(1) to ask each such registrant to make a signed statement of his refusal to be inducted. This statement is found at page 56 of the Exhibit. Paragraph 27(b)(2) provides for the sending of a notice of such refusal to

the United States Attorney and this notice can be found at page 55 of the Exhibit. These steps clearly are the last ones taken by induction officials when a registrant refuses induction and the only inference that can fairly be drawn from the evidence, even excluding for the moment the presumption of regularity, is that appellant refused to take the step forward, thereafter signed a statement to that effect and that the induction officials notified the United States Attorney—all done under the same Special Regulation concerning induction.

Thus the burden was upon the appellant to rebut the Government's showing the District Court.

The reason why appellant was not questoined concerning the events at the Induction Station, and the inherent danger in the Court considering this point now, can be seen when the case of *Bradley v. United States* (9th Cir.), 218 F. 2d 657 (Cert. granted and reversed on other grounds on March 28, 1955), is examined. In that case the evidence offered by the Government *was exactly the same as the evidence offered here.* As a matter of defense Bradley attempted to show that he was not given an opportunity to refuse induction. This Court ruled that his showing was inadequate from his own testimony, even though as a matter of fact he was never asked to take a formal "one step forward." In the instant case, had appellant raised this point at the trial of the case the Government could *at least* have produced evidence to fall within the *Bradley* case.

POINT THREE.

A. Appellant Was Not Entitled to Receive a Copy of the Report of the Hearing Officer to the Department of Justice.

In his argument (Appellant's Br. p. 12) appellant intimates that the case of *Gonzales v. United States,* 348 U. S. 407, decided March 14, 1955, ruled that a registrant in the Selective Service System must be given a copy of the report of the Hearing Officer to the Department of Justice. This is not the holding of that case. The Court said (at p. 417):

> "We hold that the over-all procedures set up in the statute and regulations, designed to be fair and just in their operation . . . require that the registrant receive a copy of the Justice Department's recommendation and be given a reasonable opportunity to file a reply thereto."

Nothing is said in the Opinion about any requirement that a copy of the Hearing Officer's report to the department be given a registrant, and appellant's position with respect to the *Gonzales* case is unsound.

B. There Is No Evidence in the Record That Appellant Did Not Receive a Copy of the Department's Recommendation.

Appellant's statement in this regard consists of the following (Appellant's Br. p. 12):

> "No copy of the Department's recommendation was placed in the file until after the Appeal Board's decision."

The *Gonzales* case did not rule that the Department's recommendation must be placed in appellant's file at any

particular time. The *Gonzales* case ruled that a registrant must be given a copy of the Department's recommendation, in an appropriate case, prior to the time the Appeal Board acts. No evidence was offered on this point other than appellant's Selective Service file. It was never mentioned throughout the trial or in any motion presented to the District Court, or in appellant's points on appeal. The fact that the Department's recommendation was not added to the file until after the Appeal Board's decision is no evidence on whether appellant received a copy of the Department's recommendation, for in any event it would not become a part of his file until after the Appeal Board's decision.

It is not here contended by appellee that the appellant did in fact receive a copy of the Department's recommendation. Rather it is the position of appellee that this Court cannot pass upon that issue without taking the evidence on it now.

In the light of the recent Supreme Court cases in the Selective Service Field, we do not view this as a failure of proof by the Government, and therefore plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. The Supreme Court reversed the *Gonzales* case where evidence had been produced by the defendant at the trial that he had not received a copy of the Department's recommendation, but on the same day in an Opinion written by the same judge, the Supreme Court affirmed the case of *Witmer v. United States,* 348 U. S. 375, where no such record was made at the trial. The Supreme Court has adopted the same approach in cases submitted to them since the decision in the *Gonzales* case. Thus, in *Bradley v. United States, supra,* the Supreme Court on March 28, 1955 granted certiorari and reversed, as the record

had been made in the trial court that the registrant had not received a copy of the Department's recommendation. On the same date, the Supreme Court denied certiorari in the case of *White v. United States,* 215 F. 2d 782 (9th Cir.), and *Tomlison v. United States,* 216 F. 2d 12 (9th Cir.), where the record had not been made at the trial. It is submitted that this Court should approach the problem in the same manner as the Supreme Court and decide these cases based on a record made at the trial.

In any event this case is clearly distinguishable from the *Gonzales* case. In the instant case appellant *failed to appear at the hearing before the Hearing Officer* [Ex. 49]. There is nothing in the Act or regulations which requires a registrant to appear at the hearing conducted by the Department of Justice. On the other hand, a registrant is in a poor position to claim that he has been denied due process of law by the Department of Justice when he fails to take advantage of the opportunity offered him by the Department. The Supreme Court said in the *Gonzales* case that the registrant was "entitled to know the thrust of the Department's recommendation" (p. 414). Appellant might well have learned of the Department's "thrust" had he appeared at the hearing. In a sense, he failed to exhaust his administrative remedies before the Department.

C. The Recommendation of the Department of Justice Was According to Law and Based on Facts Contained in Appellant's Selective Service File.

In his personal appearance before the Local Board on December 19, 1952, appellant stated [Ex. 2, p. 30] that he worked at Com-Air Products which he described as a machine shop doing defense work. He stated that the company manufactured cylinders for aircraft. He indi-

cated that the nature of the work was secret. Appellant was sent a résumé of the investigative report which can be found beginning at page 51 of his Selective Service file. It reveals (p. 52) that at the time of the investigation in 1954, appellant was then employed by the A. O. Smith Corporation working on material on subcontracts for the Air Force and the Navy. The résumé further reveals (p. 53) that appellant had quit a job in January of 1952 giving as his reason that he was entering the United States Army. In *White v. United States,* 215 F. 2d 782 (9th Cir.), this Court said at page 786:

> "In view of his experiencing no difficulty working upon the manufacture of munitions for war, the board was not without justification in concluding that White had no conscientious objections to participation in war through the manufacture of arms and munitions, just so long as he did so for a private company and not for the government. It was therefore but natural for the boards to believe that if a registrant's conscience was not bothered while working on war contracts he could not justly claim he was conscientiously opposed to noncombatant participation in war activities . . . The registrant's facility in forwarding the cause of war, force and killing through activity in a war plant, may well demonstrate his failure to establish his status as a person conscientiously opposed to noncombatant duty."

It should be noted that in the *White* case the registrant had been classified I-A-O, the same classification received by appellant here. Thus it can be seen that the Department of Justice as well as the Local Board and the Appeal Board applied the yardstick fixed by this Court in the *White* case.

In *Witmer v. United States, supra,* the Supreme Court endorsed a searching inquiry into the sincerity and good faith of a claimant for a conscientious objector classification. The Court said (pp. 381-382):

> "In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. . . . any fact which casts doubt on the veracity of the registrant is relevant."

In the *Witmer* case the Court upheld the registrant's I-A classification noting among other things that while he claimed to be a conscientious objector he promised to increase his farm production and contribute a satisfactory amount for the war effort. Surely, working in a plant making the tools of war contributes more directly to the war effort than does the growing of food on a farm.

D. Loss of a Privilege by Reason of Appellant's Negligence Is Not a Denial of Due Process.

Government's Exhibit 1 reveals that appellant was sent a notice on January 21, 1954, notifying him that the date set for his hearing was February 4, 1954. Appellant failed to appear at the hearing, and the Hearing Officer returned his file to the Department of Justice. Thereafter, the Department of Justice held itself ready to grant a new date for a hearing for several days after it received the file [Ex. 2, p. 41]. When the Department learned [p. 42] that appellant's last address was the one to which the notice had been sent they processed his file from the written record. On February 16th, appellant advised the Local Board of his new address and advised the Hearing Officer on March 1, 1954, nearly a month after the original date set for hearing. The Hearing Officer immediately contacted the Department [Ex. 1]

and the Department advised him in reply that it had already processed his file. According to appellant he did not appear at the hearing because he had moved and failed to advise the draft board of his change of address [Tr. 35; Ex. 2, Appellant's letter of March 1, 1954].

Section 1641.3 of the Selective Service Regulations (32 C. F. R. 1641.3) provides:

> "It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

In his letter to the Hearing Officer [Ex. 1] appellant characterizes this as his "negligence." At the trial appellant said that it was his "fault" [Tr. 35], and that he took the "blame" [Tr. 37]. The facts surely bear out that it was appellant's fault. At the trial he offered the excuse that when he moved he didn't expect to remain at his new address very long and didn't wish to change his driver's license, notify the draft board and every other place of a change of address [Tr. 35]. In his letter to the Hearing Officer appellant gave a different version—that his draft board was the *only* one that he forgot to notify of his change of address. Appellant was given a hearing by the Department of Justice and the fact that he did not appear at that hearing was caused by his own negligence.

Appellant asserts that it was an abuse of discretion not to grant him a new hearing. As just noted, the notice

of hearing was sent appellant two weeks prior to the date set for the hearing. The Department of Justice tried to reach him and held itself ready to grant a new date for several days after appellant failed to appear, but finally processed his file from the record [Ex. 1, Department's letter dated March 12, 1954]. Is this an abuse of discretion? Surely the facts speak for themselves.

Appellant cites several cases purportedly in support of his contention that he was entitled to a second hearing. The cases referred to involve a personal appearance by a registrant before the Local Board, and it is obvious from the reading of them that in each instance the Court felt that the registrant was without fault. In the instant case appellant did not have a hearing before a Hearing Officer because of his own negligence. Should this Court adopt appellant's contention here, it would lift the burden placed on a registrant to keep the Selective Service System advised of his whereabouts and place the burden upon Selective Service and the Department of Justice to seek out and find a registrant. This is clearly impractical and contrary to the intention of the regulations. Further, it would open the door to fraud.

E. The District Court Did Not Err in Quashing the Subpoenas Duces Tecum.

At the trial below appellant subpoenaed the report of the Hearing Officer to the Department of Justice and the F.B.I. reports relating to his case. Judge Carter quashed the subpoenas [Tr. 26-27]. There can be no question here as to the propriety of quashing the subpoena for the report of the Hearing Officer. When appellant failed to appear for the hearing the Hearing Officer returned his file without making a report [Ex. 1].

Appellant argues in his brief (p. 22) that the District Court erred in quashing the subpoena for the F.B.I. report stating that the Court should have compared the F.B.I. report and the Hearing Officer's report to determine if the Hearing Officer's report was a fair one. This argument is obviously untenable since no Hearing Officer's report was in existence.

This Court stated in *White v. United States, supra,* in footnote 11, page 790:

> "It is a matter of common knowledge that if the F.B.I. is to obtain from neighbors or acquaintances of the registrant a report on which it can rely, it is essential 'that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged,' *Elder v. United States, supra,* 202 F. 2d 465 at 469. A favorable report by a neighbor who expects to have his identity disclosed to registrant would not be worth much."

The Court then went on to observe (pp. 790-791):

> "We see nothing in the requirements of the statute or in the demands of due process or in what was decided in the *Nugent* case which would require that any portion of an F.B.I. investigation undertaken for these purposes should be made available to the registrant either before the Hearing Officer or at the time of his prosecution for failure to submit to induction. . . .
>
> ". . . but surely the Supreme Court knew perfectly well that if there were anything to appellant's present contention such would normally be Nugent and Packer's next step, once they were put on trial. We refuse to believe that the Court labored and brought forth a mouse of a decision that the Hearing

> Officer need not show the F.B.I. report when the situation was such that the trial Court must necessarily admit it."

Appellant was given a résumé of the F.B.I. Investigative Reports [Ex. 2, pp. 51-53]. There is nothing in the Department's letter of recommendation to the Appeal Board [Ex. 2, pp. 47-50] that is not included in that résumé and in the appellant's Selective Service file. Since these were the only matters before the Appeal Board, and the only matters that could possibly affect appellant's classification, the F.B.I. reports themselves are immaterial.

As heretofore noted, appellant did not appear at the hearing before the Hearing Officer. There is no conceivable theory under which appellant can now claim that he was prejudiced by the refusal of the Court to admit the F.B.I. reports when appellant failed to appear at the Department of Justice hearing where he could discuss the matter with the Hearing Officer and explain or deny any of the matters contained therein.

POINT FOUR.

Appellant's Liability for Service Was Not Illegally Extended Beyond Age 26.

In *Talcott v. Reed, etc.*, 217 F. 2d 360 (9th Cir., 1954), this Court ruled that when the validity of a I-A classification was necessarily dependent upon the validity of a prior IV-F classification, the Court could properly inquire into whether there was a basis in fact for that IV-F classification. It is settled, however, that a registrant is not

entitled to a judicial review of any classification from which he did not appeal. *Rowland v. United States,* 207 F. 2d 621 (9th Cir.). In the instant case appellant did not appeal from his IV-F classification [Ex. 2, p. 11] but was satisfied to remain there for nearly three years. Thus, he is not now entitled to urge upon the Court the invalidity of his IV-F classification.

At the trial below appellant argued that he was entitled to challenge the IV-F classification because, he contended, he could not appeal from that classification. The regulations do not support this position. Selective Service Regulation 1626.2(a) (32 C. F. R. 1626.2(a)) provides:

> "* * * the registrant * * * may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition."

It is true, then, that a registrant may not appeal as to the *finding* of his physical condition, but it is also true that a registrant may appeal from a IV-F classification urging upon the appeal board that even if his physical or mental condition is as the Local Board has found it to be, he is still entitled to some other classification. This, appellant did not do.

The danger of permitting a judicial review of a classification when there has been no appeal from the classification can be demonstrated by the facts in this case. Appellant was born on August 31, 1926. He did not become 26 years of age until August 31, 1952—more than a year

and a half after he left Pacific Bible College [Ex. 2, pp. 16 and 52]. Appellant did not contact his local board and inform them that he was no longer in school. He did not advise the Board that he was working in a defense plant. He did not claim to be a conscientious objector. Rather, appellant was content to abide with his IV-F classification and thus avoid induction. In his brief at page 23 appellant speculates that he was entitled to a IV-D classification and adds:

> "* * * It could well be that he would have remained so qualified until after his 26th birth date."

The fact remains, however, that any qualification appellant might have had for a IV-D classification terminated in January, 1951, when he left Pacific Bible College [Ex. 2, p. 52]—more than a year and a half before he reached age 26.

In any event, appellant's Selective Service file reveals that there was a basis in fact for the IV-F Classification. Appellant registered under the Universal Military Training and Service Act in September, 1948. On his registration card [Ex. 2, p. 1], he was asked in question number 12, "Were you ever rejected for service in the armed forces?" Appellant checked the answer "Yes" and wrote the date "1945." Further, the Local Board was advised [Ex. 2, p. 13] that appellant was rejected for service on April 4, 1945, because of "valvular heart disease." This constitutes a basis in fact for the IV-F classification. The Court might compare the record here with that in *Talcott v. Reed, etc., supra,* where the Court considered the same

contention as here is urged. At page 364 the Court stated:

> "To the printed question in the questionnaire as to whether, in his opinion, he had any mental or physical disqualifications, he answered, 'No.' He later added, 'I was discharged from Naval Reserve Training Corps because of a punctured ear drum. And again later he explained, 'As stated in Series XV, I feel that the condition of my ear drum should be clearly established.' It would, perhaps, have been advisable for the Board to have complied with this suggestion, but that they did not do so does not vitiate the evidence tending to establish the punctured ear drum. The evidence constituted a basis in fact. See *Dickinson v. United States,* 346 U. S. 389, and *Cox v. United States,* 332 U. S. 442, 443."

There is stronger evidence in the instant case to support the IV-F classification than in the *Talcott* case, and the District Court's finding that there was a basis in fact [Tr. pp. 49-50] should not be disturbed.

As heretofore noted, the Supreme Court on March 28, 1955, denied certiorari in the case of *White v. United States, supra.* The instant case is on all fours with the *White* case, *i. e.,* both White and Kaline were classified I-A-O principally because of their employment in war work. At the time the Supreme Court denied certiorari all the law had been written with respect to the *Gonzales* case. It is submitted that if the Supreme Court saw no compelling reasons to upset the conviction of White, this Court should find no compelling reason to upset the conviction of the appeillant here.

Conclusion.

1. The District Court did not err in denying appellant's motion for judgment of acquittal.

2. The Judgment of the District Court is supported by substantial evidence and its judgment should be affirmed.

Respectfully submitted,

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